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K-9 LEGAL MANUAL

LEGAL ISSUES IN THE USE OF  
POLICE DOGS IN MASSACHUSETTS

GOVERNMENT DOCUMENT  
COLLECTION  
AUG 6 1986  
University of Massachusetts  
Depository Copy

Publication: 14191-22-400-9-85  
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## Introduction

The use of police dogs in law enforcement has raised many legal issues, especially in the area of narcotics detection. This manual is intended to serve as a practical legal guide for the K-9 officer. A K-9 officer cannot be fully effective unless he is aware of the possible legal implications of his conduct. An illegal search by a K-9 officer may lead to the suppression of evidence and possibly the dismissal of charges against a guilty individual. The improper use of a patrol dog which subsequently leads to an injury may result in civil or even criminal liability for both the police department and the K-9 officer. This manual, therefore, will attempt to define the legal standards which K-9 officers are subject to in Massachusetts.

### I. K-9s and Narcotics Detection

The Fourth Amendment to the United States Constitution and Article 14 of the Massachusetts State Constitution Declaration of Rights protect individuals from unreasonable searches and seizures of their persons, houses, papers, and personal effects. The Fourth Amendment and Article 14 also protect individuals from unreasonable governmental intrusions into their legitimate expectations of privacy. 1/

Any seizure of personal property is considered unreasonable under the Fourth Amendment unless it is conducted pursuant to a warrant issued upon probable cause which particularly describes the items to



be seized. "Seizures" and "searches" of property are governed by similar constitutional standards. 2/ This general rule is subject to certain exceptions; the most common of which involves some type of exigent circumstances.

#### A K-9 Sniff May Be Considered A Search

The United States Supreme Court and various federal appellate courts have considered the questions of whether and under what circumstances a K-9 sniff will constitute either a search or a seizure for Fourth Amendment purposes. The Massachusetts appellate courts have yet to rule on a case in this area. However, the K-9 officer should be aware that Massachusetts courts have been more restrictive in search and seizure cases than have the federal courts. This was recently the case in Commonwealth v Upton. 3/

Both the United States Supreme Court and the United States First Circuit Court of Appeals (which governs the Federal District Court in Massachusetts) have held that a sniff of luggage by a trained K-9 in a public place did not constitute a search for Fourth Amendment purposes. Therefore, probable cause was not required for a K-9 sniff in these particular circumstances. 4/

These courts have stated that although individuals have a constitutionally protected privacy interest in their luggage, a K-9 sniff is considered much less intrusive than a typical search since



the luggage does not have to be opened for the K-9 to perform the sniff. 5/ The sniff performed by a dog will reveal only the presence or absence of the narcotics. Even if the sniff is positive, this limited disclosure does not involve the owner of the property with the more traditional and embarrassing investigative methods. 6/

It should be noted that most of these "luggage sniff" cases are limited to their particular facts. In United States v Place, Supra the officers exposed a suspect's luggage to the K-9 in a public travel terminal. In United States v Race, Supra, the court considered a routine K-9 check of baggage in an airport freight area. On the other hand, at least one federal court has held that a K-9 sniff of a person is indeed a search for Fourth Amendment purposes (such as a sniff in a public school). 7/

When the officer exposes a container to a K-9, he is held to other applicable constitutional standards. If it becomes necessary for the police to temporarily detain the holder of the container in order to expose it to a K-9, the courts will require that the police have had a reasonable suspicion based on specific and articulable facts to have detained the holder. This situation should be viewed as being similar to a threshold inquiry of an individual 8/. If the detention becomes protracted, the court may require that the officers show full probable cause for the stop of the individual.



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If the officer is unable to justify the initial stop and the later detention, the fruits of the search may be suppressed.

For example, in Place, Supra, the court held that a ninety minute detention of the suspect's luggage (to expose it to a K-9) was too long a period to justify as an investigative stop. The court in Place, Supra did state that police have a right to conduct brief investigative stops of luggage which the police reasonably suspect contains narcotics.

The cases that have been discussed thus far have involved "sniffs" in public locations. If the officer and his K-9 are wrongfully in an area that is considered constitutionally protected any evidence seized as a result of the K-9 sniff may be suppressed. For example, if police wrongfully enter a person's apartment and a K-9 detects narcotics from a suitcase within the apartment, a court will likely suppress the narcotics as evidence. The courts have reasoned that since the police were wrongfully in the area initially, any evidence that has been gathered within the area will be suppressed.

#### Baggage Terminal and Warehouses

Random checks of stored freight in warehouses or baggage terminals by trained K-9 probably would not involve Fourth Amendment issues since there is no recognized expectation of privacy. 9/



There is no Fourth Amendment issue in the use of a dog for a routine check of commingled international and domestic freight in an airport warehouse. Similarly, a random check of lockers in a public area such as school corridors probably involves no Fourth Amendment issues. 10/

#### Sniff of a Particular Item

A more difficult area of the law has been the exposure of a particular bag, container, or locker to a trained K-9. Although many federal courts have indicated that there is no Fourth Amendment concern in this case, the K-9 officer should be aware that Massachusetts courts may yet adopt more restrictive rules. It is therefore recommended that a K-9 officer have a reasonable suspicion based upon specific and articulable facts that a particular container holds narcotics before exposing it to a trained K-9. This standard would not require the probable cause necessary for a full search but it does require that the officer have more than a mere "hunch." The canine officer in this situation should have the reasonable suspicion necessary for a threshold inquiry of an individual.

#### Sniffs of an Individual

K-9 sniffs of individuals have been criticized by many courts which have considered them. 11/ There is a strong potential for



civil liability of the officer (and his governmental employer) if a K-9 during such a sniff bites or even badly frightens an individual. 12/ A sniff of an individual should be conducted (if at all) only under very limited circumstances and only if the officer has at the very least, a reasonable suspicion to believe that the person possesses contraband his person.

#### Conducting the Search

If a trained dog reacts positively to the presence of narcotics, the officer will then have probable cause to search a container. As a general rule, this officer would then seek a search warrant for the container (unless the situation fits one of the exceptions to the warrant requirement). The officer's affidavit in support of the search warrant must contain the necessary facts from which a Magistrate can determine if there is sufficient probable cause to believe that the container holds narcotics.

An officer's conclusory statement in an affidavit such as " the K-9 reacted positively to the presence of narcotics "would probably be insufficient to establish probable cause. Instead the affidavit should include the following: 13/

1. That the officer and K-9 are trained in the area of narcotics investigation.

2. That prior positive responses by the K-9 had consistently revealed narcotics.



3. That on this particular occasion the K-9 displayed the same positive response that it had showed on past occasions when the reaction had revealed narcotics.

#### Training and Courtroom Testimony

As mentioned earlier, a positive reaction given by a trained K-9 to a container can provide probable cause for a search of the container and the subsequent arrest of an individual. If the search or arrest is then challenged in court, the officer will have to demonstrate to the court both his personal expertise and his K-9's reliability and training. The K-9 officer must be prepared to testify to the training history of his K-9 in the field of narcotics detection. The officer should also describe to the court the K-9's past work experience. Most importantly, the officer must testify that his K-9's reaction to the container in question was a reaction which in the past had consistently and accurately detected the presence of narcotics.

K-9 officers should be aware of a recent study that was conducted in Florida. The study showed that trained K-9s reacted positively for narcotics when exposed to paper money taken at random from prominent citizens. Defense lawyers have used this study to argue that a high percentage of money is narcotics tainted, Therefore, these lawyers have argued, a positive K-9 reaction should





not be sufficient to constitute probable cause for a search. To overcome this argument, a K-9 officer should be prepared to testify that his dog is trained to react to a greater quantity of a narcotic than mere residue.

The K-9 officer will have to show his own training and any continuing education, as well as his experience with that particular K-9. Remember that the K-9's excited behavior, by itself, is not enough proof that a controlled substance is present. The District Attorney must be able to present "a strong foundation of the K-9's reliability and the handler's expertise." 14/

### Conclusion

The K-9 officer should remember that most of the decided cases in this area involve stops in public airport terminals. As of now there have not been many decisions involving K-9 sniffs in other locations (other than schools, see Horton, Supra). The K-9 officer should realize that any abuse in using K-9s in the narcotics area may lead to more restrictive rules than presently exist.

### Suggested Foundation Questions For Use In Court

1. How long have you been a police officer?
2. How long have you been a K-9 handler?



3. What kind of K-9 training do you have in the area of narcotics detection?
4. Do you participate in continuing training in this area?  
Describe it.
5. Have you ever taught a course in this area?
6. Do you read any publications in the area of K-9 narcotics detection?
7. Describe the training your K-9 has received in the area of narcotics detection.
8. Describe any continuing training your K-9 has received in the area of narcotics detection.
9. Describe your duties working with the K-9.
10. How long have you worked with this K-9?
11. What reaction does your K-9 give when he detects narcotics?
12. How many times during your work with K-9 has your K-9 given this reaction?
13. How many times has your K-9's reaction actually led to the detection of narcotics?
14. How many times has your K-9's reaction not led to the detection of narcotics?
15. Directing your attention to the date and time question , did you expose Exhibit 1 (the bag, container etc) to the K-9?
16. Describe the K-9's reaction.



## II Use of K-9s to Track Suspects

Massachusetts courts have allowed evidence at trial concerning the trailing of suspects by trained dogs. 15/ The admission of such evidence is within the discretion of the trial judge. A trial judge will conduct what is called a voir dire (a hearing outside the presence of the jury). During the voir dire, the Prosecutor will ask the officer questions to determine the training and experience of both the dog and the handler. At the end of the questioning, the judge will decide whether the K-9's reactions are reliable. If reliable, evidence of the K-9's tracking will be permitted at the trial.

The trial judge will want to know what training the dog and the handler have received in the tracking of suspects. The trial judge will also want to know how often the K-9 has successfully tracked suspects in the past. If the K-9 is of a particular breed that is suited for tracking, this should also be brought to the attention of the trial judge.

The handler should be able to testify as to exactly when and where the K-9 picked up the scent. (The officer or witness who can place the suspect at the location where the K-9 picked up the scent will have to testify. It would be helpful to the case if the witness can testify that this area remained undisturbed until the K-9's arrival.).



The handler will have to then show that he and the K-9 arrived on the scene within a reasonably short time after the suspect had left the area. The handler should also be able to testify that the scene appeared to be fresh and uncontaminated. If possible the handler should testify that the trail led straight to the suspect without any significant interruption.

Suggested Foundation Questions:

A. The Responding Officer

1. What time did you arrive on the scene?
2. What time did you call a K-9 Unit?
3. What did you do with the scene while awaiting the K-9?
4. What time did the K-9 Unit arrive?
5. What did you observe the K-9 Unit do?
6. Did the condition of the scene remain the same from the time you arrived until the time the K-9 Unit arrived?

B. The K-9 Handler

1. How long have you been a police officer?
2. How long have you been a K-9 Handler?
3. Describe your training and experience?
4. Describe the training and experience of your K-9.





5. How long have you and the K-9 worked together?
6. Do you train with your K-9?
7. How many times have you successfully tracked suspects with your K-9?
8. Can you explain any earlier unsuccessful tracking events?
9. Is the breed of your K-9 known for its tracking ability?
10. Directing your attention to the date in question, what time did you arrive at the scene?
11. What time did you first receive notification?
12. Describe the area or article which gave the K-9 the scent.
13. Did the area or article appear to be undisturbed?
14. Describe the trail the K-9 followed to the defendant.
15. Did the trail appear to be undisturbed?
16. How many interruptions were there in the trail?
17. Did your K-9 show any hesitation during the tracking?
18. How far from the original scene did the K-9 locate the defendant?

Note: If the responding officer is unable to tell from his own knowledge when the defendant was last on the scene, a court may require the witness who actually saw the defendant at the scene (or who found the article which gives off the scent) to testify.

### III. Police Deployment of K-9s as "Reasonable Force"

Massachusetts courts have not specifically addressed the issues



involved in police use of K-9s in either an arrest or crowd control situations. However, in an old civil case (1914) the court held that it is a jury question as to whether a dog's deployment was reasonable or excessive force. 16/

The Massachusetts Supreme Judicial Court has adopted the Model Penal Code guidelines on the use of force in law enforcement. These guidelines are as follows:

"Section 3.07. Use of Force in Law Enforcement.

"(1) Use of Force Justifiable to Effect an Arrest. Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.

"(2) Limitations on the Use of Force.

"(a) The use of force is not justifiable under this Section unless:



"(i) The actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested; and

"(ii) when the arrest is made under a warrant, the warrant is valid or believed by the actor to be valid.

"(b) The use of deadly force [emphasis supplied] is not justifiable under this Section unless:

"(i) the arrest is for a felony; and

"(ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and

"(iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and

"(iv) the actor believes that:

"(1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or

"(2) there is a substantial risk that the person to be



arrested will cause death or serious bodily harm if his apprehension is delayed." 17/

All guidelines for police units in Massachusetts relative to the use of force must conform to these Model Penal Code guidelines. Any police conduct which does not conform to these rules could result in civil or even criminal liability. For example in the federal court case of Starstead v City of Superior, 18/ the court held that under certain circumstances, abuse by police K-9s will lead to the officers and police department's liability under the Federal Civil Rights statute. Such abuse may also be considered Fourth and Fourteenth Amendment violations.

K-9 officers should be aware that a dog is considered in Massachusetts as being a dangerous weapon (at least for purposes of the armed robbery statute). 19/ A dangerous weapon has been defined in Massachusetts as being "any instrument or instrumentality so constructed or so used as to be likely to produce death or great bodily harm." 20/ This definition is very similar to the definition of deadly force which is defined as force intended or likely to cause death or great bodily harm. 21/ It is therefore likely that certain actions by police K-9s will be considered a use of deadly force.

Deployment of a K-9 may be analogized to the use of a





nightstick. Obviously, not every use of a nightstick will be considered an application of deadly force. However, if an officer uses a nightstick in a certain way (i.e. repeated blows to a suspect's head), the use of the nightstick may be considered an application of deadly and excessive force.

Similarly, if a K-9 stops and holds a fleeing felony suspect under his handler's direction, the K-9's actions would not be considered an application of excessive force. However, if the K-9 was to repeatedly bite and maul a suspect causing serious injury, these actions might well be considered an application of deadly or excessive force. If the suspect had violently resisted the K-9, such force will be probably be held as being proper. However, if the K-9 had mauled the suspect without any provocation this type of force may be held to be excessive. The K-9 officer must assess the facts of each situation to determine whether the deployment of the K-9 is a reasonable force under the circumstances. Similarly, the amount of force the K-9 uses will depend upon the particular situation.

#### Reports and Documentation

It is strongly suggested that the K-9 handler keep detailed records on the training and performance of his K-9. It is also suggested that a K-9 officer complete an incident report each time



his K-9 comes into physical contact with an individual. Such records and incident reports (if properly completed) will be helpful in the defense of any lawsuits based upon improper deployment of a K-9.

A plaintiff's attorney will have a difficult time demonstrating a K-9's alleged predisposition toward aggression if training and performance records show that the K-9 has no such predisposition. Furthermore, if the plaintiff's attorney brings a lawsuit based on the K-9's performance years after the incident in question, a properly completed incident report will serve to refresh an active officer's memory of the event. The report itself also may be admitted into evidence.

Once a K-9 is used to stop and hold a suspect, the K-9 officer must be prepared to account for the action. Practical knowledge of the relevant rules on the application of force along with proper training and handling should serve to deflect most complaints.

#### IV K-9 Use in Building Searches

All police departments have (or should have) clearly established guidelines on when and how to deploy K-9's for building searches. If an individual files a complaint concerning the use of a K-9, the best defense for the officer is to be able to prove that the K-9 officer followed the established departmental procedure.



One ground for liability will occur when a K-9 bites an innocent person during a building search. The officer must be prepared to show that he served adequate notice that a dog was to be used in the building. What constitutes adequate notice will vary according to the circumstances (i.e. size and type of the building). The K-9's bark should also be used as a notice where it is possible that non-English speaking people are within the building.

The K-9 officer must also be able to show that he or she made every reasonable effort to determine that the building contained no one but the suspect. It will also be helpful if the K-9 officer can show that patrol units blocked off all access to the building during the search.

## V General Legal Considerations

K-9 officers should have a working knowledge of those chapters of the Massachusetts General Laws which relate to dogs. For example, M.G.L. Chapter 277, section 77A makes it a misdemeanor to injure a police dog. Chapter 140, section 136A contains many sections relating to the responsibilities of dog owners and handlers. The most important section for the K-9 officer is Chapter 140, section 155A. This section provides that if an action is brought against a law enforcement officer because of damage caused by his K-9 while the officer was either caring for or maintaining



his K-9 in connection with his official duties, the Commonwealth or local community employing the officer shall indemnify him for expenses or damages incurred in the settlement or defense of the action. This indemnification section seems to refer only to damage caused by the K-9 during his care or maintenance. It probably would not apply to damages caused during the deployment of the K-9.

### Conclusion

The entire area of K-9 use in law enforcement is just developing (especially in the narcotics detection area). Any perceived abuse of K-9 use may lead to undesirable restrictions by the legislature or by the courts. K-9 officers should both carefully follow their established policies and have a working knowledge of the relevant laws to avoid such a possibility.





Footnotes

1. United States v Chadwick, 433 U.S. 1,7(1977).
2. United States v Place, 462 U.S. 696(1983).
3. In Commonwealth v Upton, 394 Mass. 363 (1985), the State Supreme Judicial Court ruled that the police search was an unreasonable violation of the defendant's Fourth Amendment rights under the U.S. Constitution. The U.S. Supreme Court later held in May 1984 that there was no Fourth Amendment violation and remanded the case to the lower court for further consideration of state law questions. The Supreme Judicial Court on remand stated that Article 14 of the Massachusetts Declaration of Rights provides greater protection of criminal defendants. The state court held that a stricter standard would be used to evaluate applications for search warrants than the standard used by the U.S. Supreme Court.
4. United States v Place, 462 U.S. 696(1983), United States v Jacobsen, 52 LW 4414 (1984), United States v Race, 529 F 2d 12(1st. Cir. 1976).
5. Place at 707.
6. Place at 707.
7. Horton v Goose Creek Independent School District, 690 F 2d 470,479 (5th Cir. 1982).
8. Terry v Ohio, 392 U.S. 1 (1968).



9. Race at 14, fn 2.
10. Horton at 479.
11. Doe v Renfrow, 631 F 2d 91(7th Cir. 1980).
12. M.G.L. Chapter 140, section 155.
13. Race at 14.
14. Race at 14.
15. Commonwealth v Smith, 352 Mass. 403, 418-419 (1967),  
Commonwealth v Moore, 379 Mass. 106, 114-115(1979).
16. Ryan v Marren, 216 Mass. 556(1914).
17. Commonwealth v Klein, 372 Mass. 823 (1977).
18. Starstead v City of Superior, 533 F. Supp. 1365 (D.C. Wis. 1982).
19. Commonwealth v Tarrant, 2 Mass. App. Ct. 483 (1974).
20. Tarrant at 486.

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